but a company, having regard to the other provisions of the Ordinance relating to dividends, namely sections 10(1)(d), 29, 44 and 46 and accordingly came to the conclusion that the statutory income of any person (whether an individual or a company) for any year of assessment in respect of dividends is the full amount of income from dividends already paid during the year preceding the year of assessment.

The appellants contend that Winslow J. was wrong. First, they say that the comptroller himself, and properly so, assessed the appellants for the year of assessment 1965 under section 10(1)(a) on the basis of profits from business. That being so, the appellants' accounts for the year ended 31st December 1964 are conclusive for the purposes of ascertaining the income for the year of assessment 1965 as such accounts were properly drawn up in accordance with current principles of commercial accounting.

In our opinion this point has no validity. It is common ground that the appellants are a holding company and not a trading company and the evidence confirms this position. The income in question is income from a dividend it received from its shareholding in a subsidiary company. In our opinion, the provisions of the charging section, section 10, clearly require the relevant assessment to be made on the basis of income from dividends under sub-paragraph (d) of subsection (1) and not on the basis of income derived from profits from a trade or business under sub-paragraph (a).

The real question then is whether on the true construction of section 35(7A) in ascertaining the statutory income of the appellants for the year of assessment 1965 the dividend that it received from its subsidiary in March 1965 can be said to be its income from dividends for the year preceding the year of assessment, i.e. the year ending 31st December, 1964.

It is submitted that as the term "income" is not defined in the Ordinance one must start with a figure based on normal commercial accounting practice, subject to express statutory modification, to calculate the income of a tax payer and that on the evidence it has been shown that in drawing up the accounts of a holding company it is a proper commercial method of accounting to anticipate dividends even though the same have not been declared as distinct from the case of an individual shareholder in a company where the date of declaration or of receipt of the dividend would be conclusive of the date on which the income arose for tax purposes.

In our judgment, this submission is untenable. To ascertain the statutory income for tax purposes for any year of assessment the Ordinance provides by section 35(1) that it shall be the full amount of the income for the year preceding the year of assessment and in the case of income from dividends, section 35(7A) specifically provides that it shall be the full amount of the income from dividends for the year preceding the year of assessment. For the purposes of the present appeal, it is conceded that an individual shareholder's income arises under section 35(7A) when the dividend is declared or paid to him by the company and in our opinion, so far as income from dividends is concerned, there can be no distinction between the case of a shareholder who is an individual and the case of a shareholder who is itself a company holding shares in another company. We agree with Winslow J. that to hold otherwise would be erroneous and contrary to common sense and would be to disregard the other provisions of the Ordinance which relate to dividends.

It may well be that good accountancy practice requires that in order to produce group accounts in the case of a chain of companies, the accounts of the various companies in the group must be consistent *inter se*, for which purpose it may be necessary to anticipate in the accounts of the companies, the probable receipts of dividends from other companies in the group although these receipts are not yet the subject matter of declarations of dividends. All that this means is that to do so is good accountancy practice as it will show the "commercial profit" for the accounting year but so far as the Ordinance is concerned it does not in our opinion show that any such anticipated dividends are income which arose in the accounting year. What we are concerned with in the present case is not the method of ascertaining the profits for the year preceding the year of assessment, in which case good accountancy practice may come into play, but the ascertainment of the full amount of the income from dividends for the year preceding the year of assessment, in which case, in our view, good accountancy practice can play no part.

For all these reasons we would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Rodyk & Davidson.*

HAJI ARIFFIN v. GOVERNMENT OF PAHANG

[F.C. (Barakbah L.P., Suffian and MacIntyre F.JJ.) September 5, 1968]

[K.L. — Federal Court Civil Appeal No. X.2 of 1968]

Administrative Law — Termination of service of Kathi — Appointment terminable under terms of contract by one month's notice — Termination of appointment — Whether this was in fact a dismissal for alleged misconduct — No opportunity to be heard — General Orders, reg. 36 — Federal Constitution, art. 135(2).

Administration of the Law of the Religion of Islam Enactment, 1956 — Appointment of Kathi — Termination of service — Exercise of powers of Ruler.

This was an appeal against the decision of Raja Azlan Shah J. dismissing the claim of the appellant. The appellant was a *Kathi* in the service of the State of Pahang and his services had been terminated by giving him three month's notice. The appellant claimed that he had been unlawfully dismissed and that he had not been given an opportunity to defend himself before his services were terminated. On appeal it was argued that only the Ruler could terminate the services of the appellant as he had been appointed by the Ruler and that his dismissal was not in accordance with law or the rules of natural justice, as he had not been given an opportunity to meet any charges brought against him.

Held, dismissing the appeal: (Barakbah L.P. and Suffian F.J., MacIntyre F.J. dissenting): (1) the Pahang State Government had the right to appoint a *Kathi* on contract subject to termination of service on notice or payment of salary in lieu and such a contract is not inconsistent with the Constitution;

(2) the appellant's services in this case had been lawfully terminated and such termination did not involve a penalty or punishment so as to make it a dismissal within the meaning of article 135(2) of the Constitution of Malaysia and to make it necessary first to give him a reasonable opportunity of being heard.

Held by the court: on the facts the appointment of the appellant had been revoked by the Ruler and it was not necessary for the letter of revocation to be signed by the Ruler.

Cases referred to:—

(1) *P.L. Dhingra* v. *Union of India* A.I.R. 1958 S.C. 36, 40.

(2) *Shrinivas Ganesh* v. *Union of India* A.I.R. 1956 Bom. 455.

(3) *City of Vancouver* v. *Vancouver Lumber Co. & Anor.* [1911] A.C. 711.

(4) *Munusamy* v. *Public Services Commission* [1964] M.L.J. 239, F.C.; [1967] 1 M.L.J. 199, P.C.

(5) *Satish Chandra Anand* v. *Union of India* A.I.R. 1953 S.C. 250.

(6) *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482.

(7) *Shenton* v. *Smith* [1895] A.C. 229.

(8) *Gould* v. *Stuart* [1896] A.C. 578, P.C.

(9) *C.B. Reilly* v. *The King* [1934] A.C. 176.

(10) *Dunn* v. *The Queen* [1896] 1 Q.B. 116.

(11) *Rodwell* v. *Thomas* [1944] K.B. 596; [1944] 1 All E.R. 700; 60 T.L.R. 481.

The following cases were also cited in argument: *Surinder Singh Kanda* v. *Government of the Federation of Malaya* [1962] M.L.J. 169 and *Verschures Creameries Ltd.* v. *Hull & Netherlands Steamship Co. Ltd.* [1921] 2 K.B. 611; [1921] All E.R. Rep. 215.

FEDERAL COURT.

K. L. Devaser for the appellant.

Abdullah bin Ghazali (Legal Adviser, Pahang) for the respondent.

In the court below on December 22, 1967 the following judgment was delivered by:

Raja Azlan Shah J.: The plaintiff was a *Kathi* employed by the defendant. The post is in Division III and is non-pensionable. He instituted the present suit, challenging the validity of a letter written by the Head of the Religious Affairs Department, Pahang, dated 23rd September, 1963, which purported to terminate his service with the defendant with three months' notice commencing from 1st October, 1963.

In the plaint, the plaintiff claimed (1) a declaration that his dismissal was void, inoperative and of no effect, and that he is still a *Kathi* in the service of the defendant, and (2) for an account to be taken of the salary and emoluments due to him from the defendant as from the date of his dismissal and payment to him of the amounts found to be due; in the alternative, damages for wrongful dismissal.

The plaintiff was appointed *Kathi*, Chenor, Temerloh, on 16th March, 1956. In accordance with the contract of service he was required to serve on probation for a period of 12 months. It is also common ground that his engagement was terminable at one month's notice or on payment of one month's salary plus cost of living allowances in lieu of notice on either side. The provisions of General Orders insofar as they were relevant to his duties as a public servant applied to him.

In August 1959 he was transferred to Bentong. With the coming into force of the Administration of the Law of the Religion of Islam Enactment, 1956, on 10th February, 1960, the Ruler formally conferred upon him the *Tauliah* on 1st January, 1961. In August 1962 he was transferred to Rompin. It was when he was serving in Rompin that the allegation occurred which led to the Head of the Religious Affairs Department terminating his service. It happened in this way.

One Jaffar bin Rahmat had thirty head of buffaloes. Twelve heifers belonging to him had died. Believing that if he offered a heifer as *zakat* all his domestic animals would be saved from evil, he offered one male heifer to the plaintiff as *zakat*. The latter refused to accept the animal in his capacity as *Kathi*, thinking that it would not be proper for him to do that. He therefore asked his *amil*, Muda bin Mat, to accept the animal which was then coming to two years old. The *amil*, on the suggestion of the plaintiff, accepted the animal as *zakat* and on the persuasion of the plaintiff he sold it to the plaintiff's wife for $50, which figure was assessed by the plaintiff himself. Out of the proceeds of sale, $12.50 was paid to the *amil* as his share, and $37.50 was set aside as revenue of the Religious Affairs Department.

On 1st May, 1963 the plaintiff met the Head of the Religious Affairs Department and asked him to supply him with a receipt book in respect of buffalo *zakat*. He was told to use the *fitrah* receipt book. The monthly return for May 1963

in respect of *zakat* no doubt reached the Religious Affairs Department and the secretary queried the plaintiff for particulars. The plaintiff gave written particulars as stated above. On 18th June, 1963 the secretary wrote to the plaintiff stating that assessment for the heifer aged nearly two years was an under-value and he was asked to send the authority from the department to sell the heifer in his district with a view to submission to higher authorities.

The plaintiff explained the circumstances which led him to persuade the *amil* to accept the buffalo as *zakat* and I think the procedure adopted by the plaintiff then found expression in paragraphs 3 and 4 of his letter dated 24th June, 1963.

Paragraph 3 reads:—

"In regard to the buffalo given as a *zakat* which was received by Enche Muda bin Mat, the *Amil* of Kuala Rompin on 6th May, 1963, and which I approved the sale of it for $50, a sum of $12.50 was handed to the *Amil* as his share with the needy and the poor, and $37.50 was handed to the Religious Department. By Allah, I say truthfully, this *zakat* is a *zakat lughiah* and not *zakat sharaiah*, but I proceeded on the procedure of *zakat shariah*, for fear of *tuhmah* (note: Arabic word meaning being accused of) misappropriating the *zakat*. According to the buffalo owner, 12 of his calves had died before he issued out the *zakat*, but after that, thank God, not even one had yet died".

Paragraph 4 reads:—

"With the above explanation, I hope you would be kind enough to cancel the account of the *zakat* in the relevant books in respect of the buffalo and the sum of $37.50 be returned to me to be in turn returned to the owner. If you are not satisfied with the above-stated explanation, please do come to Rompin to receive further explanation. That is all I inform you and thank you".

On 1st July, 1963 it appears that the Head of the Religious Affairs Department and the *Mufti* visited the plaintiff in Rompin and what transpired there can be gathered from the plaintiff's letter dated 1st July, 1963 addressed to the Head of the Religious Affairs Department in which he stated that he did not understand the verbal instruction given by the Head of the Religious Affairs Department regarding the *zakat* of buffalo and asked for a written instruction for his guidance.

The written instructions came on 5th July, 1963 and I will now reproduce them:—

1. "The sale of the buffalo which had been changed by the *Kathi* himself with the *Amil* is void and the buffalo should be returned to the owner to be his property again.
2. "In carrying out the duties of giving out the *zakat*, the buffalo owner should have the intention of handing his male buffalo which he intends to give out as *zakat* to the *Amil*.
3. "After receiving, the *Amil* may sell the buffalo according to the usual method of selling buffalo.
4. "After the sale has been completed, the *Amil* may follow the procedure of *Zakat Fitrah*, i.e. he should hand over 6 portions of the money to the Religious Department through the *Kathi* and the other two portions the *Amil* may dispose of them himself".

It would appear that these instructions were not followed for on 18th July, 1963 the Head of the Religious Affairs Department wrote to the plaintiff stating that he had failed to carry out the instructions and as such the department was "compelled to take action in accordance with the usual procedure". That letter was followed by another letter on 6th August, 1963 asking the plaintiff for the reply to the earlier letter. On 13th August, 1963 the plaintiff wrote to the Head of the Religious Affairs Department, and paragraph 3 thereof states as follows:—

"As there has been confusion over the matter of the buffalo charity tax (*zakat*) and despite explanation contained in my many letters to you which you did not accept and since you insisted that I do it according to your way and you even accused me of having changed the buffalo from the *Amil*, I earnestly request that you grant me permission to present myself before His Highness to enable me to relate the facts regarding the *zakat* and if I am found to be a treacherous person, His Highness is at liberty to deprive me of my post immediately".

On 15th August, 1963 the Head of the Religious Affairs Department informed the plaintiff:—

"That according to the advice of the State *Mufti*, the tithe on buffaloes made by Jaffar bin Rahmat is valid under Muslim law and this department is satisfied and accept the said advice. Therefore I see no reason why the matter should be re-submitted and I cannot accede to the request in paragraph 3 of your letter".

On 23rd July, 1963 the Head of the Religious Affairs Department wrote to the State Secretary.

On 15th August, 1963 the State Secretary wrote to the Private Secretary to His Highness the Sultan of Pahang and after outlining a brief history of the plaintiff's work and conduct he stated as follows (paragraphs 4 and 5):—

4. "The Head of Religious Affairs, Pahang, recommended the termination of his service as *Kathi* to safeguard the good name of the department. After studying the former cases as mentioned above and considering the proposal of the Head of Religious Affairs I am inclined to agree with the recommendation.
5. "I shall be most grateful if you could bring this matter to the knowledge of His Highness the Sultan and get his approval in connection with the action taken".

On 27th August, 1963 the Private Secretary to His Highness wrote to the State Secretary that:—

"By command of His Highness I am to state that His Highness agrees with the suggestion of the President, Religious Affairs Department, Pahang".

It would appear that on 20th August, 1963 the plaintiff again wrote to the Head of the Religious Affairs Department, and on 28th August,

1963 he replied that he could not entertain the matter any further and that he could not change what he had stated in his letter dated 15th August, 1963.

On 2nd September, 1963 the plaintiff sent to the Head of the Religious Affairs Department a money order for $112.50 being the price of Jaffar's buffalo received by Muda on 29th August, 1963.

On 3rd September, 1963 the Head of the Religious Affairs Department received the money order.

On 23rd September, 1963 the Head of the Religious Affairs Department wrote to the plaintiff terminating his service:—

"I am directed to inform you that your services as *Kathi* are no longer required and you are given 3 months notice commencing on 1st October, 1963, terminating your services. . . .

You still have your vacation leave amounting to 31 days and you are allowed to take all the arrears at any time that you agree to take within the term of the notice provided that you inform this office in writing and are given prior approval".

The plaintiff based his claim on three grounds, *viz.* (1) his employment with the defendant was governed by General Orders and as the said notice of dismissal was not given in accordance with the provisions of General Orders, i.e. regulation 32 Cap. D, the said notice was wrongful, void and inoperative; (2) his appointment was made by the Ruler of the State under section 35 of the Administration of the Law of the Religion of Islam Enactment, 1956, and his dismissal could be terminated only by the Ruler; (3) the Ruler had revoked his appointment as the result of a report or recommendation of the Head of the Religious Affairs Department, Pahang, and that such report or recommendation was not supplied to him and he was not given an opportunity of being heard. The plaintiff therefore contended that the revocation was neither in accordance with the laws of the State of Pahang nor consistent with the rules of natural justice and was therefore void and of no effect. The provisions of art. 132 and art. 135 of the Federation Constitution were pressed in argument.

The first ground is tied up with the last ground in that if the "termination" is classified as a penalty, then the plaintiff should be given a reasonable opportunity of being heard. The second ground must fail. The notice of termination was no doubt written by the Head of the Religious Affairs Department, but that letter must not be read in isolation. In the light of the correspondence between the Head of that department and the State Secretary and the latter's correspondence with the Private Secretary to the Ruler, the notice can properly be construed as emanating from the Ruler himself.

With a view to deciding the last ground it is desirable to refer briefly to the Federation Constitution. The English common law rule comprehensively expressed in the Latin expression *"durante bene placito"* (during pleasure) has not been adopted in its entirety in this country. The harsh results of the common law have been mitigated by constitutional provisions designed to improve the position of public servants. Art. 132(2A) has, subject to exceptions expressly provided by Federal and State Constitutions, adopted the English common law that every person who is a member of the public service of the Federal or of a State Government holds office during the pleasure of the Yang di-Pertuan Agong or the Ruler or Governor as the case may be. The express exceptions are clearly embodied in art. 135 which put a check on the unabridged exercise of pleasure. The pleasure of the Yang di-Pertuan Agong, or the Ruler or Governor, would still be there, but it has to be exercised in accordance with the statutory obligations of art. 135, and it is the breach of these obligations that afford a cause of action. If the termination of service does not violate the provisions of art. 135, this court is not competent to quash an order terminating the service under item 1 of the First Schedule to the Courts of Judicature Act, 1964.

Art. 135 therefore gives two-fold protection to persons who come within that article: (1) against dismissal or reduction in rank by an authority subordinate to that which, at the time of dismissal or reduction, has power to appoint a member of that service of equal rank; and (2) against the dismissal or removal without giving them a reasonable opportunity of being heard. It is to be observed that the article applies only to members of any of the services mentioned in paragraphs (b) to (g) of clause (1) of art. 132 and that includes "members of the public service of a State". Although the Laws of the Constitution of Pahang do not provide exceptions to the doctrine *durante bene placito* embodied in art. 132(2A), the *lacunae* has been supplemented by the express provisions of art. 135. In other words, for art. 135(2) to apply in the present case the plaintiff must in the first instance be a member of the public service of the Government of the State of Pahang. Secondly, he must have been dismissed from service by way of punishment. In the latter case, if the employer exercises his right under the conditions and terms of service and does not terminate his service by order of dismissal by way of punishment, then art. 135 has no application.

I am of the view that although the plaintiff did not come under the umbrella of the State Public Services Commission, *vide* Public Services Commission (Extension of Jurisdiction) Enactment, 1958, he was nevertheless by virtue of his

employment a member of the public service of the State and therefore came within the purview of art. 135. The disciplinary authority for this officer was the State Secretary: see regulation 31, Cap. D, General Orders.

An important test for ascertaining whether termination of service amounts to dismissal within the meaning of art. 135(2) is to find out whether a Government servant had a right to the post in question (see *P. L. Dhingra* v. *Union of India* [1]). If he is appointed substantively to a permanent post or to a temporary post for a fixed period, then in the absence of contract or service rule he cannot be turned out of his post, unless the post as in the first case abovementioned is abolished or unless he has been guilty of misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the Public Officers (Conduct and Discipline) Regulations, 1956, i.e. Cap. D of General Orders, read with art. 135(2). Except in the two cases mentioned above, a Government servant has no right to his post, and termination of service of a Government servant does not amount to a dismissal. If the Government servant is appointed to a post, permanent or temporary, on the express condition or term that the employment will be terminable on one month's notice on either side, then the Government may at any time terminate his service by serving the requisite notice. It may well be that in certain cases misconduct, inefficiency, or other disqualification is the motive which influences Government to take action under the terms of the contract, but as long as the termination is founded on the right flowing from the contract then *prima facie* the termination is not a punishment within the meaning of art. 135(2). The motive which sets the Government machinery in motion is irrelevant (see *Shrinivas Ganesh* v. *Union of India* [2]).

The plaintiff in the present case had completed the prescribed period of probation and had been in service for about five years after the expiry of that period and no evidence has been led to establish that the said period had been extended. In the circumstances it is not possible to say that he was at the time of "termination" still on probation. The plaintiff can conveniently be described as holding a substantive appointment in the permanent post (non-pensionable) of *Kathi* of Rompin. Under his contract of service he had a right to the post in question subject to the express term that his appointment would be terminable at one month's notice on either side. It is true that the motive which had influenced Government to terminate his service stemmed from the apparent conflict of opinion between him and his department concerning the tithe on buffaloes, but as the power to exercise that right flowed from an express term of the contract, in view of the decided authorities the termination was not a punishment so as to amount to a dismissal. It may be observed that no "appropriate proceedings" under Cap. D of General Orders were taken against the plaintiff, for if it was intended to embark on those lines the disciplinary authority, i.e. the State Secretary would have been the appropriate person to exercise disciplinary action. Further, it is of significance to note that the "termination" was not visited by any penal consequence such as loss of pay, pension, leave, or any other benefit for which the plaintiff might otherwise have been entitled (see Reg. 48 Cap. D, General Orders). The three months' notice is rather benevolent to the plaintiff.

The action is dismissed with costs.

The plaintiff appealed against the dismissal of his action to the Federal Court.

Cur. Adv. Vult.

Barakbah L.P.: I have had the advantage of reading the judgments of my brothers before their delivery. Their reasoning and conclusion are diametrically opposed. In my own judgment, the learned trial judge Raja Azlan Shah was right in the conclusion to which he arrived; and I agree that for the reasons elaborately stated by my brother Suffian F.J. that the appeal should be dismissed.

In the result the appeal is dismissed with costs.

Suffian F.J.: The plaintiff (appellant) was a *Kathi* in the service of the Government of the State of Pahang, the defendant (respondent). On the 23rd of September, 1963, the Head of the Pahang Religious Affairs Department wrote him a letter terminating his service by giving him three months' notice commencing on 1st October, 1963. On the expiry of the notice his service was terminated and he is no longer in the employment of the defendant.

The plaintiff sued the defendant by writ dated 8th January, 1964, saying that in fact he had been dismissed, not that his service had been merely terminated. His complaints were three:

(1) First, he contended that his employment was governed by General Orders and as the notice was not given in accordance with them it was wrongful, void and inoperative.

(2) In the alternative, he contended that as he had been appointed by the Ruler, only the Ruler could terminate his appointment and not the Pahang State Government nor any of its departments, and the Ruler not having terminated his appointment, the dismissal was wrongful.

(3) In the further alternative, the plaintiff contended that, if it was the Ruler who revoked his appointment, the Ruler must have done

so as a result of a report or recommendation to his (the plaintiff's) prejudice submitted to the Ruler by the Head of the Religious Affairs Department without the plaintiff's knowledge and/or any reference to him. A copy of such report or recommendation not having been supplied to the plaintiff and no opportunity having been given to him to explain its contents, he contended that the revocation by the Ruler of his appointment was neither in accordance with the law of the State of Pahang nor consistent with the rules of natural justice and was therefore void and of no effect.

The defendant contended that the plaintiff's service was by virtue of General Orders and the terms of his appointment subject to termination on notice, it was terminated on the requisite notice, it was so terminated by the Ruler and the plaintiff had not been dismissed and therefore article 135(2) of the Constitution was not applicable and it was unnecessary first to give him a reasonable opportunity of being heard. The defendant submitted that there was a distinction between termination of service and dismissal and only in the latter case did the safeguards provided by the Constitution operate.

As regards the plaintiff's second contention, the learned trial judge found as a fact from the correspondence between the Head of the Religious Affairs Department and the State Secretary and between the State Secretary and the Private Secretary to the Ruler that the notice could properly be construed as emanating from the Ruler himself.

As to the first and third contentions, the learned trial judge held that plaintiff had a right to his post but subject to the express condition that his appointment was terminable at one month's notice on either side and therefore the termination of his service was not a punishment so as to amount to a dismissal within the meaning of article 135(2) of the Constitution.

Accordingly the judge dismissed the plaintiff's claim and the plaintiff appeals to this court.

Before us Mr. Devaser for the plaintiff urged the same three contentions and a few others which I shall discuss in their proper places later.

The facts are as follows. The plaintiff was appointed *Kathi* in Chenor in 1956, that is, before the coming into force of the Federal Constitution on Merdeka Day (31st August, 1957). Prior to his appointment he had been sent a letter dated 23rd February, 1956, offering him appointment as *Kathi* in the Mukim of Chenor on certain conditions. The fourth and eighth conditions are relevant. The fourth condition states:—

"That your engagement will be terminable at one month's notice, or on payment of one month's salary plus cost of living allowance in lieu of notice on either side, provided that, if your service is dispensed with on the ground of unfitness certified by a medical board, no notice shall be required."

The eighth condition reads:—

"That in so far as they are relevant to the duties of your appointment and to your employment as a public servant, you will, throughout such employment, comply with the provisions of the General Orders applicable to your employment within the Federation of Malaya."

The plaintiff accepted the appointment on these conditions.

On 10th February, 1960, the Administration of the Law of the Religion of Islam, 1956, enacted by the Pahang State legislature, was brought into force. It established a Majlis Ugama Islam dan Adat Istiadat Melayu, Pahang (Council of Religion and Malay Custom, Pahang) to advise the Ruler on matters relating to Islam and Malay custom. Section 35 thereof as amended by the relevant date provides:—

"35 (1) The Ruler may, after consultation with the Majlis, appoint . . . . any suitable persons to be *Kathi* for such areas as he may prescribe, and may at any time revoke any such appointment. All such appointments shall be notified in the *Gazette*.

(2) The Ruler may, on the advice of the Majlis, from time to time grant or revoke letters of appointment to any . . .. *Kathi* and may by the terms of any such letter restrict the exercise of any powers which would otherwise be conferred on such . . . . *Kathi* by this enactment or by any other written law.

(3) Save as aforesaid, the jurisdiction, authority and powers of any . . . . *Kathi* shall be such as are conferred by this enactment or by any other written law."

Section 27 provides:—

"27. (1) The Majlis may delegate to the president or secretary or to any committee of the Majlis any part of its duties and powers, not being judicial or quasi-judicial powers, as it may deem fit. . . .

(2) It shall be the duty of every committee of the Majlis and of every other person or body to whom any powers of the Majlis may be delegated to inform the Majlis of all acts and things done by it or him as such committee or in pursuance of such delegation."

No delegation by the Majlis under section 27 has been brought to our notice.

On 1st January, 1961, the Ruler formally conferred upon the plaintiff the *tauliah* Exhibit P.1. In my opinion this must have been done under sub-section (2) of section 35 of the Enactment and the *tauliah* is not a letter of appointment as such, but merely defines the plaintiff's powers as *Kathi* in the district named in the *tauliah*.

In August, 1962, the plaintiff was transferred to the District of Rompin. It was when he was serving there that the events occurred

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which led to the termination of his service. It happened in this way.

One Jaafar bin Rahman had 30 buffaloes. Twelve of them died. Believing that if he offered a heifer as *zakat* all his buffaloes would be saved from evil, he offered one to the plaintiff as *zakat*. The plaintiff refused to accept it in his official capacity, thinking that it would not be proper for him to accept it. He asked his *amil*, Muda bin Mat, to accept it. The *amil* on the plaintiff's suggestion accepted it as *zakat* and on the plaintiff's persuasion sold it to the plaintiff's wife for $50, which figure was assessed by the plaintiff himself. Of this $50, $12.50 was paid to the *amil* for distribution by him among the poor and $37.50 was credited to the Religious Affairs Department.

On 1st May, 1963, the plaintiff met the Head of the Religious Affairs Department and asked him to supply him with a receipt book in respect of buffalo *zakat*. He was told to use the *fitrah* receipt book. The Secretary of the Religious Affairs Department asked the plaintiff for particulars of the $37.50 credited to the department. The plaintiff gave him the particulars. On 18th June, 1963, the secretary wrote to the plaintiff, stating that the heifer aged nearly two years had been undervalued and the plaintiff was asked if he had authority from the department to sell the heifer.

The plaintiff explained the circumstances which led him to persuade the *amil* to accept the buffalo as *zakat*.

On 1st July, 1963, it appears that the Head of the Religious Affairs Department and the *Mufti* visited the plaintiff at Rompin and what transpired there can be gathered from the plaintiff's letter dated that day addressed to the Head in which he said that he did not understand the verbal instructions given to him by the Head regarding the *zakat* buffalo and asked for written instructions for his guidance.

The written instructions came on 5th July, 1963. They said:—

"(1) This sale of the buffalo which had been changed by the *Kathi* himself with the *amil* is void and the buffalo should be returned to the owner to be his property again.

(2) In carrying out the duties of giving out the *zakat*, the buffalo owner should have the intention of handing his male buffalo which he intends to give out as *zakat* to the *amil*.

(3) After receiving, the *amil* may sell the buffalo according to the usual method of selling buffalo.

(4) After the sale has been completed, the *amil* may follow the procedure of *zakat fitrah*, i.e., he should hand over six portions of the money to the Religious Affairs Department through the *Kathi* and the other two portions the *amil* may dispose of himself."

It would appear that these instructions were not followed, for on 18th July, 1963, the Head of the Religious Affairs Department wrote to the plaintiff stating that he had failed to carry out the instructions and therefore the department was "compelled to take action in accordance with the usual procedure". On 13th August, 1963, the plaintiff wrote to the head a letter, of which paragraph 3 reads:—

"As there has been confusion over the matter of the buffalo *zakat* and despite explanations contained in my many letters to you which you did not accept and since you insisted that I do it according to your way and you even accused me of having changed the buffalo from the *amil*, I earnestly request that you grant me permission to present myself before His Highness to enable me to relate the facts regarding the *zakat* and if I am found to be a treacherous person, His Highness is at liberty to deprive me of my post immediately."

On 15th August, 1963, the head informed the plaintiff that according to the advice of the State *Mufti* the *zakat* made by Jaafar bin Rahman was valid under Muslim law, the Religious Affairs Department accepted the advice, and the head therefore saw no reason why he should accede to the plaintiff's request for an audience with the Ruler.

In the meantime the Head of the Religious Affairs Department had on 23rd July, 1963, reported this matter to the State Secretary. On 15th August, 1963, the State Secretary reported it to the Private Secretary to the Ruler, recommending that the Ruler terminate the plaintiff's service. That letter is on page 74 of the record and reads in full as follows:—

"(13) on Phg. Conf. 82/61

15th August, 1963.

CONFIDENTIAL

Confidential Secretary to
H.H. the Sultan of
Pahang, *PEKAN*.

Hj. Ariffin b. Hj. Chot, Kathi Rompin

I am glad to inform you that a statement had been received from the Head of Religious Affairs Pahang, as per copy attached in connection with Hj. Ariffin. Kathi Rompin.

2. Formerly Hj. Ariffin was appointed as *Kathi* Chenor, Temerloh on 6th March, 1956 and was transferred to Bentong on 19th August, 1959 and then to Rompin on 16th August, 1962. In 1961 this officer was tried in the magistrate court, Temerloh on the charge of false intention in order to own land in that District. He was found guilty and was fined $50 or 2 weeks imprisonment. He appealed to the Supreme Court and his case was discharged and he was freed. At the time when he became the *Kathi* of Bentong an appeal was received from the people there asking for transfer of this *Kathi* on the ground that his work and conduct did not satisfy the people there. This matter was investigated and as a result of it he was transferred to Rompin, where another case concerning the work of this officer arose as mentioned.

3. This officer is serving in Division III for the Government. His basic salary $205 per month and has not been placed on the pensionable establishment. According to General Orders, the highest authority to take disciplinary action against him is the State Secretary Pahang, because the post of *Kathi* is not included

under the establishment of the Public Service Commission, Pahang.

4. The Head of Religious Affairs, Pahang recommended the termination of his service as *Kathi* to safeguard the good name of the department. After studying the former cases as mentioned above and considering the proposal of the Head of Religious Affairs I am inclined to agree with the recommendation.

5. I shall be most grateful if you could bring this matter to the knowledge of His Highness the Sultan and get his approval in connection with the action taken.

Dato' Ismail b. Mohd. Jamil,
M.C.S., P.J.K.
State Secretary,
Pahang."

No copy of this letter was supplied to the plaintiff, who contended that its paragraph 2 was highly prejudicial to him (as indeed it was) and he should have been given an opportunity of explaining to His Highness before a decision was made to dismiss him.

On 27th August, 1965, the Private Secretary to the Ruler wrote to the State Secretary:—

"His Highness directed me to inform you of his approval with the proposal of the Head of Religious Affairs Department, Pahang" (i.e., to terminate the plaintiff's service).

Subsequent to this, it appears that the plaintiff fully complied with the instructions of the Religious Affairs Department and remitted to them the full price of the buffalo after deducting the amount payable to the *amil*. The learned Legal Adviser did not deny this.

On 23rd September, 1963, the Head of the Religious Affairs Department wrote to the plaintiff conveying the decision to terminate his service as follows:—

"I am directed to inform you that your services as *Kathi* are no longer required and you are given three months' notice commencing on 1st October, 1963, terminating your services. . . .

You still have your vacation leave amounting to 31 days and you are allowed to take all the arrears at any time that you agree to take within the term of the nctice provided that you inform this office in writing and are given prior approval."

Second Contention

It is convenient to take first the plaintiff's second contention that at the material time, 23rd September, 1963, under section 35 of the Administration of the Law of the Religion of Islam Enactment, No. 5 of 1956, only the Ruler may revoke his appointment (clause (1) of article 135 of the Constitution, reproduced elsewhere in this judgment, was also relied on for this proposition) and this appointment had not been revoked by the Ruler. It is plain that by virtue of section 2(2) of and the First Schedule to the Pahang Public Service Commission Enactment, No. 22 of 1960, a *Kathi* is outside the jurisdiction of the Pahang Public Service Commission and, therefore, by virtue of section 35 of Pahang Enactment, No. 5 of 1956 (there is no need to rely on clause (1) of article 135 of the Constitution) only the Ruler may revoke the plaintiff's appointment. I agree, however, with the learned trial judge that on the facts as disclosed by the correspondence, the plaintiff's appointment had indeed been revoked by the Ruler himself, though the letter giving him notice was not signed by the Ruler. Mr. Devaser indeed conceded that it was unnecessary for the Ruler himself to sign that letter. Accordingly the second contention fails.

Before us Mr. Devaser made the further contention that the decision to revoke the plaintiff's appointment if made by the Ruler should have been made after consultation with the Majlis in view of the explicit language of section 35 of the Enactment. I agree that the Ruler can act only after consultation with the Majlis, but for the reason that follows I am of the opinion that this further contention also fails.

That the Ruler could only revoke the plaintiff's appointment after consultation with the Majlis, is a matter of law, but whether or not he did so after consultation with the Majlis, is a matter of fact. The plaintiff's statement of claim merely alleged that only the Ruler could terminate his appointment and not the State Government nor any of its departments. Nothing was said about consultation with the Majlis in the pleadings, though it was open to the plaintiff to say so. Indeed the notice of argument in the court below make it quite plain that at the trial Mr. Devaser again stressed that the only person who could have revoked the plaintiff's appointment was His Highness. If the plaintiff had complained in his pleadings of a want of consultation by the Ruler with the Majlis, the defendant would have been alerted to the need to counter this allegation in the pleadings and later rebut it by evidence. As the plaintiff failed to do so when he could have done so, in my judgment he should not be allowed to succeed by here raising on the facts a case which was not presented in the lower court, see Privy Council case of *City of Vancouver* v. *Vancouver Lumber Company & Anor.*[3] at page 721.

First and Third Contentions

As regards the first and third contentions, it is convenient that they be taken together.

The plaintiff accepted appointment on the condition (No. 4) that his engagement was terminable at one month's notice, or on payment of one month's salary plus cost of living allowance in lieu of notice on either side, and on the further condition (No. 8) that in so far as they were relevant to his employment he was throughout such employment to comply with the provisions of General Orders applicable to it.

The plaintiff was a non-pensionable officer in Division III and therefore regulations 32 and 36 of General Order, Cap. D, were applicable to him. They read as follows:—

"32. Before the Disciplinary Authority imposes any penalty on an officer not on the pensionable establishment who is in Division III . . . . of the Public Service [such as the plaintiff] . . . . the officer concerned must be given an adequate opportunity to exculpate himself. . . . ."

"36. Notwithstanding anything in regulation 32 . . . the Government may dispense with the services of any officer . . . . not on the pensionable establishment by giving due notice in accordance with the terms of his appointment. In the case of monthly paid officers who . . . . are on the permanent non-pensionable establishment [such as the plaintiff], the period of this notice will normally be three months, but Government reserves the right to terminate the appointment of an officer not on the pensionable establishment by payment of one month's emoluments in lieu of notice without assigning any reason."

On 31st August, 1957, the Federal Constitution came into force. The plaintiff, being a member of the public service of the State of Pahang, was clearly a member of the Public Service for the purposes of the Constitution, see article 132(1).

With effect from 31st May, 1960, clause (2A) was added to article 132 to provide that:—

"Except as expressly provided by the Constitution of the State, every person who is a member of the Public Service of the State holds office during the pleasure of the Ruler. . . ."

This clause is nothing new — it only reaffirms the previous common law rule that a member of the public service of the State held office during the pleasure of the Ruler. But in so reaffirming the old common law rule, clause (2A) goes further by providing that it is now subject to exceptions expressly provided by the Constitution of the State. In my judgment it is also subject to exceptions provided by the Federal Constitution and by written law. No exceptions provided by the State Constitution were cited to us. However, exceptions provided by the Federal Constitution were cited to us, namely, those in clauses (1) and (2) of article 135 of the Federal Constitution which read:—

"135 (1) No member of any of the services . . . . [the public service of the State of Pahang is one of them] shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank.

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard."

It is also convenient at this stage to quote clause (3) of the article which reads:—

"(3) No member of any of the services mentioned in paragraph (e), (f) or (g) of clause (1) of article 132 [the public service of the State of Pahang is one of them] shall, without the concurrence of the Judicial and Legal Service Commission, be dismissed or reduced in rank or suffer any other disciplinary measure for anything done or omitted by him in the exercise of a judicial function conferred on him by law."

Mr. Devaser argued with reference to General Order, Cap. D, regulation 32, that the plaintiff had suffered a penalty by having his service terminated and the Disciplinary Authority should first have given him an adequate opportunity to exculpate himself (as was also required by clause (2) of article 135 of the Constitution), and that was not done, and with reference to regulation 36, that that regulation ceased to apply to the plaintiff when he was, admittedly, confirmed in his appointment and became "permanent". The question then arises — was the plaintiff made to suffer a penalty and was he dismissed? The learned Legal Adviser argued that the plaintiff had merely had his service terminated under General Orders, Chapter D, regulation 36 and under the terms of his appointment, and therefore was not protected by General Orders, regulation 32, nor by the Constitution.

It is common ground between both counsel that all General Orders apply to officers in the public service of the State of Pahang.

Reference to Chapter A of General Orders, reference to Chapter D of General Orders and reference to the Pensions Ordinance, No. 1 of 1951, make clear, in my judgment, that "dismissal", which is not defined by the Constitution, is used in reference to the public service not in its ordinary everyday sense but in a very special sense and that in reference to the public service there is a clear distinction made between dismissal and mere termination of service of a public officer.

An officer whose service has been terminated may have his service terminated on a ground which reflects no discredit to him or on the ground of unsatisfactory work or conduct. With reference to this, section 6 of Chapter A provides:—

"An officer who has been dismissed from the service or whose services have been terminated on the grounds of unsatisfactory work or conduct may only be re-employed in special or exceptional circumstances."

This section puts an officer whose service has been terminated on the ground of unsatisfactory work or conduct in the same category as an officer who has been dismissed from the service. By implication, an officer whose service has been terminated not on grounds of unsatisfactory work or conduct is in a different, and better, position; he may be re-employed without restrictions.

Chapter D refers in many places to punishment. Regulation 48 thereof is in these words:—

"The effect of dismissal is immediate and an officer who is dismissed forfeits all claims to pension, retiring allowance, gratuity, leave or any other benefit for which he might otherwise have been eligible."

There is no express provision stating the effect of mere termination of an officer's service, and in my judgment the implication is that an officer whose service is merely terminated does not forfeit any claim to pension, retiring allowance, gratuity, leave or any other benefit for which he might otherwise have been eligible.

Reference to the Pensions Ordinance indeed shows that an officer whose service has been terminated is treated in a better way (he may be paid a pension) than an officer who has been dismissed (he *cannot* be paid a pension).

As is well known, no officer is entitled to a pension, section 5(1) of the Pensions Ordinance; he is only eligible for it, though Government (to secure loyal and devoted service) invariably gives officers who qualify for it, a pension if they retire or even if their service is terminated in circumstances reflecting discredit, *vide* sections 8, 9 and 10. But Government gives no pension to a dismissed officer, *vide* section 5(1).

It is therefore clear that dismissal in West Malaysia is accompanied by penal consequences, but not mere termination of service. This was so found with regard to India by the Indian Supreme Court in *P. L. Dhingra* v. *Union of India.*[1]

Mr. Devaser relied on a passage from the judgment of Thomson L.P. in *Munusamy* v. *Public Services Commission*[4] in which his Lordship said at page 243 that the Indian cases which decided that dismissal for the purposes of article 311(2) of the Indian Constitution (corresponding almost to our article 135(2)) involved a punishment, should be disregarded because the Indian decisions were based upon rule 49 of the Civil Services (Classification, Control and Appeal) Rules, 1930, which do not exist in Malaysia. However, when Mr. Munusamy further appealed to the Privy Council, their Lordships of the Privy Council held in [1967] 1 M.L.J. 199 that the punishment element is involved in dismissal and where there is no punishment there is no dismissal.

Lord Hodson, delivering the judgment of their Lordships, said at page 201:—

"Their Lordships' attention was drawn to the Public Officers (Conduct and Discipline) Regulations 1956 [i.e., General Orders, Chapter D] made under the Federation of Malaya Agreement 1948 and kept in being by the Constitution. Under the heading of 'Disciplinary Procedure' regulations were made for the case of officers both on the non-pensionable and on the pensionable establishment in which the dismissal of an officer is contrasted with lesser punishment. It is sufficient to refer to one of these regulations, 37(h), which provides 'In lieu of dismissal the Disciplinary authority may inflict such less penalty by way of fine, reduction in rank or otherwise as may seem to him fit' . . . . Dismissal is treated as the penal consequence of charges meriting dismissal being established against an officer. Looking at the Constitution itself the disciplinary interpretation of dismissal is reinforced by the language of article 135 (3) which immediately follows the relevant article and contains the significant phrase 'dismissed or reduced in rank or suffer any *other* disciplinary measure.' *This confirms that the punishment element is involved in both cases. . . .*"

What happened in our case? There was some disagreement between the plaintiff and the Department of Religious Affairs. The details have already been given above. The plaintiff was asked for an explanation by the head of his department. His explanations did not satisfy the head. The head had no authority to dismiss the plaintiff. Only the Ruler, after consultation with the Majlis, may revoke the plaintiff's appointment and so the Head of the Religious Affairs Department reported the matter to the State Secretary. The State Secretary reported it to the Ruler's Private Secretary, saying that the Head of the Religious Affairs Department recommended that the plaintiff's service be terminated and he agreed with the recommendation.

On receipt of the State Secretary's report, the Ruler had two alternatives: *either* to proceed under regulation 32 of General Orders, Chapter D (that is, impose a penalty or dismiss the plaintiff in which event he must be given an adequate opportunity to exculpate himself as is also required by article 135(2) of the Federal Constitution) *or* proceed under regulation 36 and under the plaintiff's terms of appointment (by simply terminating the plaintiff's service on giving him the requisite notice). The Ruler chose to act under regulation 36 and under the plaintiff's terms of appointment, and the plaintiff's service was accordingly terminated on three months' notice. Three months' notice was indeed generous when under the terms of his appointment the plaintiff was eligible only for one month's notice.

Prior to the receipt of the notice the plaintiff had earned 31 days' leave. It is significant that this leave was not forfeited. The plaintiff, it is true, has not been paid any pension, but the pension law allows a pension to be paid to public officers (this includes non-pensionable officers, for the pension law does not say that a non-pensionable officer gets no pension: he gets a pension if he retires in certain circumstances but at a reduced rate) only if they have served a minimum period of ten years. The plaintiff had served only seven years. There was no evidence that the plaintiff had forfeited any claims to any benefit for which he might otherwise have been eligible, and I am therefore of the opinion that the termination of his service was not dismissal. Accordingly, neither regulation 32 nor

article 135(2) was attracted and the decision of the State authority to terminate his service by notice was perfectly lawful.

I am fortified in my view by the Indian Supreme Court case of *Satish Chandra Anand* v. *Union of India* [5] where it was held that the termination of a public servant's service who was governed by rules providing for such termination by one month's notice on either side, was not dismissal within the meaning of article 311 of the Indian Constitution. A private employer may lawfully terminate his employee's service by giving the requisite notice and in my judgment, the Pahang State Government as employer is not, in the absence of any law to the contrary, in a worse position than a private employer.

Mr. Devaser finally argued that the defendant was guilty of bad faith, saying that the defendant's real reason for terminating the plaintiff's service was dissatisfaction with the plaintiff which was manifested in the correspondence between him and his department, and therefore the defendant was precluded from exercising its right to terminate the plaintiff's service under the contract or General Orders. He relied on the following passage from *Dhingra's case* [1] at page 49:—

"In short, if the termination of service is founded on the right flowing from contract or the service rules, then *prima facie* determination is not a punishment and carries with it no evil consequences and so article 311 is not attracted. But even if the Government has by contract or under the rules the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal . . . . or reduction in rank, the Government may nevertheless choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of article 311 must be complied with."

It is to be noted, however, that what the Ruler did in this case was not to choose to punish the plaintiff and to found the termination of his service on misconduct, negligence, inefficiency or other disqualification. I respectfully agree with Rose J. who said in *Dhingra's case* [1] at page 51:—

". . . . when, in a given case, Government has an option to adopt one of two courses as, for example to dismiss . . . . for misconduct and at the same time to terminate . . . . under a term of the contract or because of a condition of the service, then, if it chooses to act under the right conferred by the contract, article 311 [our article 135] is not attracted even though misconduct is also present and even though that is a real reason for the action taken."

In an earlier case, *Shrinivas Ganesh* v. *Union of India* [2] decided in Bombay, Chagla C.J. said at page 457:—

"What has got to be borne in mind is that it is only in cases falling within article 311 . . . . that the Government as an employer is bound to conform to certain rules of natural justice indicated in that article . . . . But if the case does not fall . . . . within the ambit of article 311 . . .... then the relationship of master and servant is governed by the rules if there are any which would constitute the contract of employment, or it would be governed by common law if the rules do not provide for the employment of the particular person."

At page 458 the learned Chief Justice said:—

"We do not understand how an employee is entitled to question the motives of his employer if the employer has the right to dispense with his services at any time.

Whatever may be the motive which may influence the exercise of a legal right, if the legal right exists, then the motive becomes irrelevant, and if in a case where . . . . article 311 does not apply the Government has the right to dispense with the service of a temporary servant, then it is not open to the temporary servant to say that his services were dispensed with for an ulterior motive or for a motive which was not a proper motive."

Haji Arshad (D.W.1), the Head of the Religious Affairs Department at the relevant time, said in evidence regarding the letter sent terminating the plaintiff's service that he acted under General Orders, Cap. D, regulation 36. He did not mention acting under the terms of the contract with the plaintiff. I do not think that this is conclusive. The proper authority to decide whether or not to terminate the plaintiff's service was the Ruler, not the Head of the Religious Affairs Department, and it was pleaded that the Ruler acted both under General Orders and under the plaintiff's terms of appointment. This plea was repeated by the learned Legal Adviser in his arguments in the court below and the learned trial judge found for the defendant. The learned Legal Adviser repeated the same arguments before us and I agree with him that the Ruler had under the terms of the plaintiff's appointment the right to terminate the plaintiff's appointment by giving notice and it was the Ruler who in fact terminated the plaintiff's appointment.

Mr. Devaser argued that, if the plaintiff's appointment was originally contractual, it became permanent after confirmation whereupon condition (4) of the terms of appointment disappeared. He said that the plaintiff's post had ripened into a permanent post and therefore could not be terminated by mere notice. He said that the plaintiff had a right to his post. The learned trial judge indeed found that the plaintiff had a right to his post, but subject to termination by notice.

In India "semi-permanent service" and "permanent service" are defined by the Indian General Orders — as it would appear from the Indian law reports — and a semi-permanent or permanent officer has a "right" to his post. I think that is what is meant by the expression "it has ripened to a semi-permanent post" which occurs in *Dhingra's* case in paragraphs 12 and 26. I do not know what is meant by a right,

but if it exists it must flow from the Indian service rules which I regret I have not seen, because the Indian Constitution does not say that the ordinary public officer has a right to any post in the Indian public service.

Here in Malaysia there is no such thing as permanent service, though the expression is much used by Government servants — there is no such thing as permanent service because every member of the public service (other than Judges and the Auditor-General) holds office during the pleasure of the State. This was so before independence (see *Terrell's case* [6] and section 5 of the Pensions Ordinance which explicitly says that Government has the right to dismiss a public officer without paying compensation). Terrell was told before he became a judge in the then Straits Settlements that the compulsory retiring age for a judge was 62. He was compulsorily retired before that age and sued the Secretary of State. Lord Goddard C.J. said at page 500 that *Terrell* could not argue (as he did) that he had a contractual right to remain in the servce till that age, because such an argument would in effect override all the cases which decided that a servant of the Crown held office at pleasure. This selfsame argument had been put forward in *Shenton* v. *Smith* [7] and rejected by the Privy Council.

In view of this, I do not think that the plaintiff in our case had a right to remain in service until the retiring age. Indeed, the terms of his appointment expressly stated that his appointment was subject to termination on notice or payment of salary in lieu. I see nothing in this condition which is inconsistent with the Constitution, which (as has already been seen) by article 132(2A) reiterates the old common law rule that a public servant holds office during the pleasure of the Crown. In my view, the Government is not prohibited by law from stipulating that the service of any member of the public service, other than Judges and the Auditor-General, may be terminated by notice. It is true that the cases decided that such a stipulation fettered the Crown's right to terminate the service of a public officer at will — but this only means that if, notwithstanding such a stipulation, a public officer's service is terminated by the Crown at will, he cannot claim damages. It does not mean that the Crown cannot terminate the officer's service by giving the requisite notice. Why should it when the Crown may terminate without notice?

Finally, I deal with an argument of the learned Legal Adviser. He said two things. First, because of section 2(2) and the First Schedule to the State Public Service Commission Enactment, No. 22 of 1960, a *Kathi* in Pahang does not come within the jurisdiction of the Pahang Public Service Commission. Secondly, he said that section 12 of the Enactment which reads:—

> "12. (1) No person in the public service of the State shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction has power to appoint a member of such public service of equal rank.
>
> (2) No person in the public service of the State shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard."

is identical with article 135(1) and (2) of the Federal Constitution. Both propositions are correct. Therefore, the learned Legal Adviser argued, if in fact the plaintiff had been dismissed, it was unnecessary to give him a reasonable opportunity of being heard. During the course of the argument it was pointed out to him that section 12(2) of the State Public Service Commission Enactment must for this purpose be overridden by article 135(2), because article 4 provides that the Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with the Constitution is, to the extent of the inconsistency, void.

To sum up — in my judgment, the Pahang State Government has the right to stipulate that a *Kathi* may be appointed subject to termination of service on notice or payment of salary in lieu. Such a condition is not inconsistent with the Constitution which indeed says that a member of the Pahang public service holds office at the pleasure of the Ruler. If it is inconsistent, then, notwithstanding such a condition, the Ruler may terminate the *Kathi's* appointment without notice or compensation; it does not mean that the Ruler may not terminate his service on notice or payment of salary in lieu. The exercise by the Ruler of such a contractual right to terminate is the same as the exercise by a private employer of a right to terminate the service of his employee under a contract containing a similar condition. While it is true that the *Kathi* whose service is terminated under such a contract has lost a steady job, the termination does not involve a penalty or punishment so as to make it a dismissal within the meaning of article 135(2) of the Constitution and it is not, therefore, necessary first to give him a reasonable opportunity of being heard. Dismissal as used in the public service is not any termination of service — it has a special meaning and involves a penalty or punishment.

This appeal is accordingly dismissed with costs.

MacIntyre F.J.: I do not wish to go over the facts which have been dealt with fully in the judgment of my brother Suffian. It is not disputed that the proper authority to revoke the appellant's appointment is the Ruler of Pahang in consultation with the Majlis Ugama Islam.

It is also clear from the evidence that the order to terminate the appellant's appointment emanated from the Ruler himself. At the hearing before us, Mr. K. L. Devaser raised the point that the termination of the appellant's appointment was null and void in the absence of proof that the Ruler had consulted the Majlis regarding the termination. This point was not raised in the pleadings, nor argued in the court below. Thus, the respondent was deprived of the opportunity of calling evidence in rebuttal. However, when an executive order is issued it must be presumed, in the absence of evidence to the contrary, that all legal requirements had been complied with. The point taken must, therefore, be rejected.

Mr. Devaser submitted further that the premature termination of appellant's appointment by notice under regulation 36 of Cap. D of the General Orders was, in fact, a dismissal on account of alleged misconduct, and that the dismissal was null and void by virtue of the provisions of article 135(2) of the Constitution.

The trial judge found that the appellant's appointment was not terminated under regulation 36 but under his contract of employment which provides for termination by either party giving one month's notice. In the circumstances, he thought that the three months' notice given to the appellant was more than generous. His reason for holding that the action taken was not under regulation 36 is that the appellant's employment was terminated at the instance of the Ruler and not the State Secretary who is the disciplinary authority under Cap. D. This finding is, however, contrary to the evidence. The correspondence admitted at the trial indicate that the proceedings were initiated by the State Secretary on whose recommendation the Ruler approved the termination of service. The Ruler's permission had to be obtained since he was the appointing authority and article 135(1) of the Constitution declares that no member of the public service "shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank." Further, the appellant's head of department (D.W.1) deposed at the trial that the notice was given under regulation 36 of Cap. D. The learned Legal Adviser of the State of Pahang who appeared before us also confirmed this. Besides, the Government could not have lawfully acted under the termination clause in the contract of employment, because, for reasons which I shall state presently, it had been rendered inoperative and void by the addition of article 132(2A) to the Constitution in 1960.

On 23rd February, 1956, the Head of the Department of Religious Affairs, Pahang, wrote to the appellant stating that his appointment as *Kathi*, Timescale, at a salary of $1,920 per annum was under consideration subject to certain conditions. The terms included, *inter alia*, a condition that the appointment was "terminable at one month's notice, or on payment of one month's salary plus cost of living allowance in lieu of notice on either side". Another condition was that he must serve on probation for a period of twelve (12) months. The appellant accepted the terms and at the end of the probationary period in 1957, he was duly confirmed in his appointment as *Kathi* on timescale.

Article 132(1)(g) of the Constitution declares that the public service of a State is public service within the meaning of the Constitution. Article 132(2A) declares that every person who is a member of a Federal department of Government holds office during the pleasure of the Yang di-Pertuan Agong, "and, except as expressly provided by the Constitution of the State, every person who is a member of the public service of a State holds office during the pleasure of the Ruler or Governor." Articles 132(1) and 132(2A) were lifted from the Federal Constitution of 1957 and incorporated in the present Constitution under the Malaysia Act of 1963. But sub-article (2A) was added to the Federal Constitution by section 17 of the Amending Act of 1960. What then was the legal effect of the amendment on the contract of employment previously entered into by the appellant and the Head of the Religious Affairs Department?

My brother Suffian says that article 132(2A) of the Constitution merely reaffirms the previous common law rule that the member of a public service of a State held office during the pleasure of the Ruler. That may be so. But it must be conceded that since the 1960 amendment the Ruler's pleasure is no more based on the common law rule but on a provision in our Constitution which limits his right to dismiss at pleasure to the extent specified by article 135. He further says that the holding of an office at the pleasure of the Ruler is subject to exceptions provided by the Federal Constitution and by written laws. That may be so, but, with respect, not subject to exceptions provided by any written law which is inconsistent with the Constitution. By virtue of the provisions of article 4(1) of the Constitution, any law enacted after Merdeka Day, which is inconsistent with the Constitution, must be deemed void. By virtue of article 162(6) any law enacted before Merdeka Day should be applied by the court to conform to the Constitution. It, therefore, appears to me to be logical that what the State cannot achieve by legislation it cannot achieve by imposing a contract term in the contract of service of a public servant, contrary to the provisions of the Constitution.

However, in *Gould* v. *Stuart*,[8] the Privy Council held that the power of the Crown to dismiss at pleasure can be controlled by statute. The statute in question was the New South Wales Civil Service Act of 1884. The relevant part of the judgment reads as follows:—

"Sec. 34. provides for punishment by fine not exceeding £10 of an officer who is negligent or careless in the discharge of his duties; section 35 for the summary dismissal of any officer convicted of felony or any infamous offence, and the forfeiture of his office by becoming bankrupt or applying to take the benefit of an Insolvent Act, or making an assignment for the benefit of his creditors; and section 37 for fine, suspension, or dismissal in case of dishonourable conduct or intemperance. These provisions, which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. In that case they would be superfluous, useless, and delusive. This is, in their Lordships' opinion, an exceptional case, in which it has been deemed for the public good that a civil service should be established under certain regulations with some qualification of the members of it, and that some restriction should be imposed on the power of the Crown to dismiss them."

This judgment, in my opinion, supports the proposition that where a statute regulating the service of public servants provides for a fine, suspension or dismissal for any specified cause, then, to that extent only, the power of the Crown to dismiss at pleasure is limited. This point was made clear in the judgment of the Privy Council in *C.B. Reilly* v. *The King*,[9] in which their Lordships held that "If the terms of the appointment definitely prescribed a term and expressly provide for a power to determine 'for cause' it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded. This appears to follow from the reasoning of the board in *Gould* v. *Stuart*."

In *Reilly* v. *The King*, where the employment of a contract officer created by statute was terminated because the office had been abolished by statute, it was held that his employment had been terminated for a cause implied in the condition of service, namely, that an office created by statute can at any time be abolished by statute.

However, if I have read correctly the judgment of the Privy Council in the two cases referred to above, I think that the conclusion to be drawn is this, that subject to the right of dismissal of a public servant for a specified cause under the provisions of a statute or under an express or implied term of contract, he holds office at the pleasure of the Crown. It follows, therefore, that any term in a contract which empowers a department of Government to terminate the service of a public servant employed at the pleasure of the Crown by the service of one month's notice for no cause at all would operate as a clog on the exercise of the Crown's pleasure in an area not covered by these judgments, and in the present case in an area not limited by the Constitution.

In *Terrell* v. *Secretary of State for the Colonies*,[6] the question arose whether the Secretary of State for the Colonies could remove prematurely from office a judge of the Supreme Court of the then Straits Settlements, who under the terms of his contract of service was entitled to serve till the age of 62. Lord Goddard C.J. held that as the judge concerned held his office during the pleasure of the Crown, he could be, notwithstanding the terms of the contract with the Secretary of State, removed at the pleasure of the Crown. The passage which I think is relevant appears at page 497 and reads as follows:—

"Then it is submitted that even if the judges held office during pleasure the effect of the correspondence to which I have referred earlier in this judgment is to constitute a contract between the Crown and the claimant that he should be retained in office till he attained the age of 62. The present court is a creation of the Act of 1886 which by the section already quoted gave the Crown, complete freedom as to the constitution of the courts and its officers. I have difficulty, therefore, in seeing how the Secretary of State, on whose behalf the letters were written, would have authority to bind the Crown even if he had purported to do so. So to do would appear to me clearly to constitute a clog on the Crown's right to dismiss at pleasure. I regard this right as a rule of law firmly established by the decisions (for instance, *Dunn* v. *The Queen*,[10] *Shenton* v. *Smith* [7] and *Rodwell* v. *Thomas*,[11]) and once it is established that the Crown has power to dismiss at pleasure that right cannot be taken away by any contractual arrangement made by an executive officer or department of State."

In *Rodwell* v. *Thomas & Ors.*, *supra*, Tucker J. said:—

"The authorities show, not only that *prima facie* an established civil servant can be dismissed at pleasure but that the court will disregard any term of his contract expressly providing for employment for a specified time or that his employment can only be terminated in specified ways. The court regards such a provision in a contract as a clog on the right of the Crown to dismiss at pleasure at any time."

So it would appear that the court will disregard not only any term of the contract expressly providing for employment for a specified time but also any term laying down the condition for termination of the contract in a specified way. In the present case, the contract of employment lays down the term that the appellant's service may be terminated by one month's notice. It undoubtedly constitutes a clog on the Ruler's right to dismiss the appellant at pleasure and, therefore, when the amendment to the Constitution was made in 1960 declaring that a public servant's tenure of office was held at the pleasure of the Ruler, the term of the contract which laid down the condition that the appellant's service could be terminated by giving one month's notice became inoperative and void, or was void *ab initio*, if the common law rule of

holding office at the pleasure of the Ruler applied in 1956.

It is clear from the evidence that the appellant's service was terminated under regulation 36 at the pleasure of the Ruler. However, the right to terminate at the pleasure of the Ruler is subject to three constitutional guarantees provided under article 135 of the Constitution. The article reads as follows:—

"135. (1) No member of any of the services mentioned in paragraphs (b) to (g) of clause (1) of article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank.

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

(3) No member of any of the services mentioned in paragraph (e), (f) or (g) of clause (1) of article 132 shall, without the concurrence of the Judicial and Legal Service Commission, be dismissed or reduced in rank or suffer any other disciplinary measure for anything done or omitted by him in the exercise of a judicial function conferred on him by law."

These guarantees constitute a clog on the right of the Yang di-Pertuan Agong or a Ruler or Governor, as the case may be, to dismiss a public servant at pleasure. The provisions of article 135 are substantially the same as article 311(2) of the Indian Constitution. The provisions of article 132(2A) are also substantially the same as article 310(1) of the Indian Constitution which declares that a public servant in India holds office at the pleasure of the President of the Union or a Governor or Raj Pramukh, as the case may be. Commenting on the scope and ambit of these provisions and the principle governing the common law doctrine of holding office at the pleasure of the Crown, Das C.J. in his judgment in *Dhingra* v. *Union of India,*[1] which was considered persuasive by the Privy Council in *Munusamy* v. *Public Services Commission,*[4] says as follows:—

"There are clearly exceptions to the rule embodied in article 310(1) that public servants hold their office during the pleasure of the President or the Governor, as the case may be. Subject to these exceptions our Constitution, by article 310(1), has adopted the English common law rule that public servants hold office during the pleasure of the President or Governor, as the case may be and has, by article 311, imposed two qualifications on the exercise of such pleasure . . . . Passing on to article 311 we find that it gives a two-fold protection to persons who come within the article, namely, (1) against dismissal or removal by an authority subordinate to that by which they were appointed and (2) against dismissal or removal or reduction in rank without giving them a reasonable opportunity of showing cause against the action proposed to be taken in regard to them."

My brother Suffian, however, holds the view that article 135(2) does not apply to the instant case, since the termination of an appointment pursuant to regulation 36 of Cap. D is not dismissal within the meaning of the General Orders. He relies on regulation 48 of Cap. D which reads:—

"48. The effect of dismissal is immediate and an officer who is dismissed forfeits all claim to pension, retiring allowance, gratuity, leave or any other benefit for which he might otherwise have been eligible."

When the appellant's employment was terminated he was a Division III officer not on the pensionable establishment. He had then served Government in a substantive post for six years and had he been permitted to continue in service he would have become eligible for pension on completion of the tenth year of service. For the purpose of disciplinary action under the service rules, the relevant regulations are regulations 32 and 36 of Cap. D which read:—

"32. Before the Disciplinary Authority imposes any penalty on an officer not on the pensionable establishment who is in Division III or IV of the Public Service or who is a daily-rated officer the officer concerned must be given an adequate opportunity to exculpate himself. The fact of dismissal of an officer in Division III or IV, or a daily-rated officer must be reported in every case to the secretariat concerned."

"36. Notwithstanding anything in regulations 32, 33 and 34 the Government may dispense with the services of any officer or employee not on the pensionable establishment by giving due notice in accordance with the terms of his appointment. In the case of monthly paid officers, who have served one year or more in a temporary capacity or are on the permanent non-pensionable establishment, the period of this notice will normally be three months but Government reserves the right to terminate the appointment of an officer not on the pensionable establishment by payment of one month's emoluments in lieu of notice without assigning any reason."

Action under regulation 36 could not have operated to deprive the appellant of pension since he was on the non-pensionable establishment. He was, however, informed of his eligibility to take his accumulated leave. There is no evidence that the termination of service involved any of the punishments enumerated in regulation 48. It would appear, therefore, that the appellant was not 'dismissed' within the meaning of the service rules.

Be that as it may, I would with the greatest of respect say, that we are not concerned in this case with the meaning of 'dismiss' under the service rules but with the meaning of that word in article 135(2) of the Constitution. The Constitution is the supreme law of the land and a provision in the Constitution should not, in my opinion, be construed by reference to a subsidiary legislation or regulation made thereunder. In the second place, I do not think that a provision of the Constitution should be interpreted in a limited sense so as to deprive a public servant of a constitutional right conferred by the Constitution.

In *Munusamy* v. *Public Services Commission,*[4] Thomson L.P. said:—

"Now, with the utmost respect that course of reasoning, as was pointed out by Bose J. in his dissenting judgment in the case of *Dhingra, supra,* is open to the fatal criticism that it involves controlling the interpretation of a provision of the Constitution itself by reference to a piece of subsidiary legislation made under it. The only excuse for such a course, if it be an excuse is that it was rendered necessary, as was shown in the case of *Chandra, supra,* by the apparent impossibility that otherwise existed of drawing a distinction between the expressions 'dismissal' and 'removal'. That difficulty, however, does not arise in the interpretation of our article 135(2) which speaks only of dismissal."

The Lord President then went on to hold that 'dismissal' in article 135(2) meant nothing less than putting an end to the servant's service by the master and that there was no reason "for placing any artificial restricted meaning on the expression as used in article 135(2)". On appeal to the Privy Council ([1967] 1 M.L.J. 199), their Lordships held that the expression 'dismiss' in article 135(2) carried with it an element of punishment because article 135(3), to quote the judgment, "strengthens the view that 'dismiss' relates to disciplinary action." It appears therefore that the Privy Council did not overrule the proposition that a provision of the Constitution cannot be construed by reference to a subsidiary legislation but sought to construe article 135(2) by reference to article 135(3) of the Constitution itself. The relevant part of the judgment reads:—

"Looking at the Constitution itself the disciplinary interpretation of dismissal is re-inforced by the language of article 135(3) which immediately follows the relevant article and contains the significant phrase 'dismissed or reduced in rank or suffer any *other* disciplinary measure.' This confirms that the punishment element is involved in both cases."

It is clear from the decision of the Privy Council that there must be an element of punishment in the dismissal envisaged by article 135(2) because 'dismiss' must be read *ejusdem generis* with "other disciplinary measure" mentioned in article 135(3). However, it is obvious that any action taken under regulation 36 is also a disciplinary measure since the regulation falls under Part B of Cap. D which is intituled "Disciplinary Procedure." Therefore, to hold that an action taken under regulation 36 for an alleged misconduct is not 'dismissal' within the meaning of article 135(2) could lead to a situation whereby the constitutional guarantee could be flouted in the case of Division III and Division IV officers who are not on the pensionable establishment by the simple means of taking disciplinary action under regulation 36. To construe the scope and ambit of article 135(2) in a manner which may result in the exclusion of a class of public servants from enjoying the constitutional protection would be contrary to the purpose and object of the Constitution. Such a construction should, in my opinion, be rejected in favour of one which would extend the protection to all classes of public servants enumerated in article 132(1). Since the premature termination of an appointment for an alleged misconduct involves the loss of a career, future earnings and prospect of pension, it is also by itself a punishment, and that is the penal consequence which must be implied in the kind of 'dismissal' envisaged by article 135(2).

In *Dhingra's case* [1] *supra,* a distinction is drawn between the rights of Government servants holding a substantive civil appointment in a permanent or semi-permanent post on the one hand, and those holding a temporary or probationary appointment on the other. The majority opinion was that a member of the former class of Government servants acquired a 'lien' on his post, i.e. to say, a right to hold the post until superannuation or compulsory retirement, unless in the meantime he becomes physically or mentally incapable of holding the office or is dismissed at the pleasure of the President, or Governor or Raj Pramukh, as the case may be, subject to the constitutional guarantees. It was further held that the premature termination of the service of a Government servant who had acquired the right to hold his post for alleged misconduct is punishment *per se,* but the premature termination of the service of a temporary or probationary officer effected in accordance with the provision in the contract of employment is not, *prima facie,* a dismissal and does not operate as punishment *per se.* The court in *Dhingra's case* approved the decision in *Satish Chandra Anand* v. *Union of India* [5] in which it was held that the premature termination of service of a Government servant holding a temporary post under the terms of his contract is not dismissal *per se;* and the decision in *Shrinivas Ganesh* v. *Union of India,* [2] in which it was held that where the employment of a temporary officer is terminated in accordance with the terms of his contract, then the fact that the termination was brought about for misconduct would not attract the provisions of article 311(2) of the Indian Constitution. The distinction drawn between the rights of public servants employed on a permanent basis and those employed on a temporary basis is indeed surprising especially in view of an earlier assertion in the judgment that article 311(2) did not discriminate between classes of public servants. However, I am not sufficiently informed of the legal and constitutional position of a temporary or probationary officer in the service of the Government of India or of a State to comment on these judgments. But, as far as the appellant is concerned, there is no reason to doubt that by virtue of the 1960 amendment of the Constitution, he held office thereafter at the pleasure of the Ruler. He could have been dismissed at any time but not at the pleasure of the State

Secretary but at the pleasure of the Ruler which is subject to the constitutional guarantees under article 135.

Adverting to the judgment in *Dhingra's case*, it would appear that the right acquired by a Government servant to hold his post is not a right conferred by any provision in the service rules but by implication arising from the nature of the tenure of office. A person who holds a substantive appointment in a permanent post is said to acquire that right. In this country Government posts are not designated as permanent or semi-permanent. Government servants here hold office on a temporary basis or on probation subject to confirmation or, when confirmed, on timescale. A timescale officer must be regarded as being in the permanent service. That is why the appellant's head of department, in the course of his evidence, said that he was a Division III officer holding a non-pensionable permanent appointment. The post of a *Kathi* is a permanent post in the State Administrative Service. The appellant was the substantive holder of that post. He held his appointment on timescale under a scheme of service which envisages employment during the pleasure of the Ruler from date of appointment to date of retirement. Applying the principle in *Dhingra's case*, the appellant must be deemed to be the holder of a substantive office in a permanent post and, as such, the premature removal from office for alleged misconduct must be regarded as a punishment by itself.

However, article 132(2) of our Constitution provides that in the case of public servants other than those employed in the service of a State, the Yang di-Pertuan Agong may by federal law regulate the qualifications for appointments and conditions of service and that in the case of public servants employed by a State, the Ruler or Governor, as the case may be, may regulate such qualifications and conditions. Despite the very wide powers given to the Yang di-Pertuan Agong or the Ruler or Governor to regulate the conditions of service, those powers can only be exercised subject to the provisions of the Constitution which is the supreme law. It must follow, therefore, that any regulation in Cap. D which is inconsistent with or which contravenes any of the provisions of the Constitution is *ultra vires* and the court will have to disregard it. The full implication of regulation 36 of Cap. D is that where Government desires to take disciplinary action against a public servant, even by dismissal for misconduct, it could in the case of non-pensionable officer in Division III disregard the provisions of regulation 32 which provides that "the officer concerned must be given an adequate opportuunity of exculpating himself" and terminate his appointment by giving him three months' notice without assigning any reason. The regulation, in my opinion, violates the constitutional guarantee given to a public servant under article 135(2) of our Constitution, and must be regarded as either void under article 4(1), if the service regulations under Cap. D were re-issued after Merdeka Day on the authority of the Yang di-Pertuan Agong or should be read with such modification so as to conform with the constitutional guarantees by virtue of the provisions of article 162(6), if the intention was to terminate his employment for misconduct.

It is not denied that the appellant's service was terminated because of an alleged misconduct. His request to his head of department for permission to explain his conduct to the Ruler was turned down. Therefore, he had been denied his constitutional right to be heard before dismissal. The appeal must, therefore, succeed with costs here and in the court below.

The judgment of the High Court should be set aside and judgment entered for the plaintiff in terms of paragraph 6 of the statement of claim.

Appeal dismissed.

Solicitors: *K. L. Devaser & Co.*

ANJALAI AMMAL & ANOR. v. ABDUL KAREEM

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and MacIntyre F.J.) September 15, 1968]

[Penang — Federal Court Civil Appeal No. X26 of 1968]

Practice and Procedure — Pleadings — Particulars — Parties bound by pleadings.

Land Laws — Adverse possession — Acquisition of indefeasible title — Inquiry into.

This was an appeal against the decision of the High Court reported in [1968] 2 M.L.J. 92. The issue for trial which arose from the pleadings in this case was whether one *K* had acquired an indefeasible title by adverse occupation before May 30, 1955. The learned trial judge held that *K* had not acquired an indefeasible title before May 30, 1955, but he went on to hold that the continuity of adverse possession was not broken since there was evidence that one Ooi Boon Kay, to whom *K* had transferred her interest in the land, went into possession through his agent, *K*. The appellant appealed.

Held, allowing the appeal: the learned trial judge had in this case departed from the strict rules of procedure in deciding the case on an issue not raised in the pleadings and he should have dismissed the claim, once he found that *K* had not acquired an indefeasible title against the owner by adverse possession, on or before May 30, 1955.

Cases referred to:—

(1) *Trustees, Executors, & Agency Co. Ltd. & Templeton* v. *Short* (1883), 13 App. Cas. 793.

(2) *Thomson* v. *Birkley* (1883), 47 L.T.R. p. 700.

(3) *Spedding* v. *Fitzpatrick* (1888), 38 Ch.D. 410 at 413.

(4) *Thorp* v. *Holdsworth* (1876), Ch.D. 637 at 639.